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LITIGATING NUCLEAR WASTE DISPOSAL ISSUES BEFORE THE NRC: A FABLE OF OUR TIME†

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I. INTRODUCTION

According to President Carter, technical inadequacy and political flaws have hampered past efforts to develop a safe method for permanent storage of radioactive waste.[1] On February 12, 1980, the President, therefore, proposed a fifteen-year program to do so. Its primary objective is "to isolate existing and future radioactive waste from military and civilian activities from the biosphere and pose no significant threat to the public health and safety."[2] In response to the technical flaws of the current system, the proposed program emphasizes permanent storage in stable geological depositories as the best ultimate solution. As an interim solution, the President has called for increasing the storage capacity at nuclear power plants and establishing an "away

† The opinions expressed in this article are those of the authors and do not represent the opinions or policies of the Attorney General or the State of Illinois.

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1. President's Message to Congress On Radioactive Waste Management Program, 16 WEEKLY COMP. OF PRES. DOC. 296, 297 (Feb. 18, 1980) [hereinafter cited as President's Message].

2. *Id.*

from reactor" site for temporary storage of radioactive waste.[3]

President Carter addressed the "political" problem by issuing an executive order establishing a State Planning Council,[4] the purpose of which is to increase state and local involvement in the "waste management planning process" so that these units of government can "help fulfill our joint responsibility to protect public health and safety in radioactive waste matters."[5] The President viewed the political problem as one of involvement. "In the past, states have not played an adequate part in the waste management planning process—for example, in the evaluation and location of potential waste disposal sites. The states need better access to information and expanded opportunity to guide waste management planning."[6]

Increased involvement is essential, but it belongs in the category of solutions—it is not the problem. In examining Carter's proposal, the *New York Times* focused on the true difficulty:

> The new waste management plan was announced 35 years after the beginning of the nuclear age and at a time when a significant number of state and local officials and members of the public have developed a wide distrust of all nuclear programs because of earlier official assurances that the radioactive waste problem had been solved.[7]

This "wide distrust" is the true problem. Certain aspects of the political problem identified by President Carter will be discussed and why

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3. *Id.*
4. *See* Exec. Order No. 12,192, 45 Fed. Reg. 9127 (1980). The Order provides:
   The Council shall be composed of eighteen members as follows:
   (a) Fourteen members designated by the President as follows:
      (1) Eight governors of the various states
      (2) Five state and local officials other than governors
      (3) One tribal government representative
   (b) The heads of the following Executive agencies:
      (1) Department of the Interior
      (2) Department of Transportation
      (3) Department of Energy
      (4) Environmental Protection Agency
   (c) The Chairman of the Nuclear Regulatory Commission is invited to participate in the activities of the Council; representatives of other departments and of United States territories and the Trust Territory of the Pacific Islands are invited to take part in the activities of the Council when matters affecting them are considered.

   Id. In his message to Congress, President Carter expressed his intention to seek legislation making the Council permanent.
5. President's Message note 1 *supra*, at 297.
6. *Id.* at 298.
7. N.Y. Times, Feb. 13, 1980, at 1, col. 2.

the political solution will fail will become apparent.[8]

This discussion will first address the underlying cause of public distrust: The President's proposed solution leaves intact the current statutory and regulatory scheme which controls the licensing and operation of nuclear facilities. This structure is centered around the Nuclear Regulatory Commission (NRC) which performs its statutory duties in such a way that public discussion of important issues is often foreclosed. Public involvement, therefore, has become meaningless. Second, this article will examine how the concepts of "exhaustion of remedies," "primary jurisdiction," and "limited judicial review" frustrate efforts to seek relief against the NRC in court. Third, the doctrine of preemption and how it prevents the involvement of state and local governments in the regulatory process will be explained. Finally, the State Planning Council and alternative solutions, will be considered.

II. THE NUCLEAR REGULATORY COMMISSION: "COME, LET US REGULATE TOGETHER"

High level radioactive wastes[9] pose significant hazards to the public health and environment. In order to protect the public, the Atomic Energy Act of 1954 (AEA)[10] delegates to the Nuclear Regulatory Com-

8. This paper will not address the feasibility of the proposed "technical" solution. Many people believe current technology adequately meets the challenge of waste disposal, and that the entire problem is political. *See, e.g.*, Silberg, *Storage and Disposal of Radioactive Waste*, 13 TULSA L.J. 788; *but see* Hansell, *The Regulation of Low-Level Nuclear Waste*, 15 TULSA L.J. 249 (1980).

9. Nuclear wastes derive from many sources: research investigatons, medical diagnostics and treatment, mining and processing of uranium ore, defense related nuclear activities, and operation of commercial nuclear power plants. Wastes exist as solids, liquids, and gases. The major types are:

(a) High level or "transuranic" wastes: spent nuclear fuel rods or the portion of the wastes generated in the reprocessing of the fuel and the fabrication of plutonium to produce nuclear weapons.
(b) Low-level wastes: These are generated by almost all activities involving radioactive materials and are classified as wastes containing less than ten curies of transuranic contaminants per gram of material.
(c) Uranium mine and mill tailings: Residues from uranium mining and milling operations.
(d) Gaseous effluents: These are produced in many defense and commercial nuclear activities, such as reactors, fuel fabrication facilities, uranium enrichment plants and manufacturing facilities. They are released into the biosphere in a controlled manner, after passing through successive stages of filtration, and mixed with the atmosphere where they are diluted and dispersed.

It should be noted that spent fuel rods have not been considered "waste" under NRC regulations. For full technical definitions see 10 C.F.R. part 50, App. F (1979).

10. 42 U.S.C. § 5841 (1976). The NRC assumed the regulatory and licensing functions of the original Atomic Energy Commission with passage of the Energy Reorganization Act of 1974. 42 U.S.C. § 5841(f) (1976). The original commission also did research, developmental, and promo-

mission exclusive authority to regulate storage of civilian radioactive waste. While the Atomic Energy Act defines NRC structure, the Administrative Procedure Act (APA)[11] controls its operation. President Carter's proposal leaves intact the statutory structure and operation of the NRC.

Under the APA, the NRC may engage in two general types of actions: rulemaking and adjudication. Rulemaking consists of any agency process for formulating, amending, or repealing a rule.[12] Rules are "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy, or describing the organization, procedure, or practice requirements of an agency . . . ."[13] Adjudication refers to any agency process for the formulation of an order. An order is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than a rulemaking, but including a licensing."[14] Licensing of nuclear facilities, if contested, is handled in adjudicatory proceedings. The following examination of the process by which the NRC operates within this framework reveals how it inhibits public involvement and meaningful discussion of issues.

A. *Adjudication: "All radioactive material is hazardous—you'll have to be more specific"*

Individuals, local groups, and state governments most often attempt to participate in the regulatory process by intervening in adjudi-

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tional work in the nuclear energy field. The 1974 Act vested all nonregulatory functions of the AEC in the Energy Research and Develoment Administration which, in turn, merged into the Department of Energy in 1977. *See* 42 U.S.C. § 7151(a) (Supp. I 1977).

The NRC's power to license disposal sites has been challenged. An intervenor in a pending action has alleged the NRC has no authority to license "Away From Reactor" storage sites (AFR) for spent fuel rods. The intervenor contends that the Atomic Energy Act contains no specific provisions for such licensing, that no agency regulations for such licensing exist, and that any regulations which might be promulgated would be void for lack of statutory authority. *See* G.E. Morris Operation Spent Fuel Storage Facility, Renewal of SNM-1265, No. 70-1308 (Illinois Motion to Dismiss, filed Feb. 14, 1980, denied Feb. 29, 1980.).

11. Administrative Procedure Act, 5 U.S.C. § 551 (1976).

12. 5 U.S.C. § 551(5) (1976).

The APA established three categories of rulemaking procedure: (1) rulemaking with no more party participation than the agency chooses for its own purposes, free from limitations; (2) rulemaking in accordance with the basic pattern of notice and written comments, as provided by § 553, but with many additions and modifications; and (3) rulemaking on the record in accordance with § 556 and 557.

1 K. DAVIS, ADMINISTRATIVE LAW § 6:1 (2d ed. 1978).

13. 5 U.S.C. § 551(4) (1976).

14. *Id.* at § 551(6).

catory proceedings. Such proceedings include licensing actions,[15] and orders to show cause why existing licenses should not be revoked, suspended, or modified.[16] Licensing actions involving nuclear power plants attract the most public concern and involvement.

Obtaining a license for a nuclear plant involves a two step procedure.[17] First, the utility submits a construction permit application. This includes preliminary designs which must meet the criteria of the NRC staff. The staff reviews the application and issues a Safety Evaluation Report. The NRC's Advisory Committee on Reactor Safeguards reviews the application and the staff's evaluation.[18] The Atomic Safety and Licensing Board (ASLB)[19] conducts a mandatory public hearing on the application. Any "interested party" may petition to intervene in the proceeding to question some part of the application.[20] Once the ASLB grants the construction permit,[21] any party may appeal that decision to the Atomic Safety and Licensing Appeal Board (ALAB). The Commission itself has discretionary power to review the ALAB's decision.[22] If the Commission takes no action within forty-five days, the last decision becomes final and can be appealed directly to the United States Court of Appeals.[23] Approximately three years prior to completion of plant construction, the licensee submits an application for an

15. The NRC issues licenses for the following: (1) byproduct material, 10 C.F.R. Part 30 (1979); (2) source material, 10 C.F.R. Part 40 (1979); (3) production and utilization facilities, 10 C.F.R. Part 50 (1979); (4) special nuclear material, 10 C.F.R. Part 70 (1979). Currently no regulations exist for high level radioactive waste disposal or away-from-reactor spent fuel storage facilities; but proposed regulations are under consideration. *See* proposed regulations, 10 C.F.R. Parts 60, 61 and 72 (1979).

16. *See* 42 U.S.C. §§ 2236, 2237, 2239 (1976); 10 C.F.R §§ 2.202, 2.206 (1979). This paper will not discuss in detail the procedures for order to show cause. Such petitions for proceedings are rarely granted. *See* Illinois v. NRC, 591 F.2d 12 (7th Cir. 1979); Porter County Izaak Walton League v. NRC, 606 F.2d 1362 (D.C. Cir. 1979) for explanations of the rationale supporting decisions to deny requests for proceedings pursuant to 10 C.F.R. § 2.206.

17. For the details of the procedure, see 10 C.F.R. §§ 2.1-2.913 (1979).

18. The ACRS consists of independent consultants possessing expertise on nuclear energy and environmental issues. While it can make recommendations, the NRC may ignore its advice.

19. The ASLB consists of three individuals: an attorney and two other members possessing technical backgrounds. 42 U.S.C. § 2241 (1976).

20. 42 U.S.C. § 2239 (1976).

21. The Licensing Board has never denied an application that has reached the stage of final decision. Some applications have been withdrawn prior to final consideration, however. 42 U.S.C. § 2235 (1976).

22. "Contrary to what the public probably perceives, the Commissioners themselves play no role in licensing decisions except on rare occasions. In fact, the old AEC created the multiple levels that exist today for licensing decisions—hearing board, appeal board, ACRS—in large part to insulate itself from the licensing process," THREE MILE ISLAND: A REPORT TO THE COMMISSIONERS AND TO THE PUBLIC, vol. I, at 140 (Jan., 1980) [hereinafter cited as ROGOVIN REPORT].

23. 28 U.S.C. § 2342; 42 U.S.C. § 2239 (1976). The statute vests exclusive jurisdiction in the court of appeals. A district court, therefore, may not review a licensing action.

operating license. The NRC repeats the same procedures in considering the operating permit, except that a second public hearing is not mandatory unless requested by a party or intervenor.[24]

The hearing is the key to public involvement and discussion in the licensing process. Section 189(a) of the Atomic Energy Act states that, in any licensing proceeding, "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to each proceeding."[25] Although the legislative purpose is unclear, it seems this section may have been intended to provide a setting for discussion of economic questions.[26] The hearing first became a forum for discussion of health and safety issues in the mid-1950's in the *Power Reactor Development* case.[27] Congressional displeasure with the manner in which the Atomic Energy Commission handled that case resulted in amendment of section 189(a) in 1957 to provide for mandatory hearings on every construction permit and operating license application.[28] The report of the Joint Committee on Atomic Energy clearly indicated that the mandatory hearings were intended to provide a public forum for full, free, and frank discussion of the hazards involved in any particular reactor.[29] The Committee saw this as the best way to insure safe reactors and instill public confidence in nuclear energy.

Examination of the NRC's procedure reveals how it stymies congressional intent. In order to intervene in a license proceeding, after standing is established, the intervenor must file written contentions stating his complaints. The contentions must fall within the scope of the issues set forth in the Federal Register Notice of Hearing.[30] The intervenor must state the contention, and its basis, with reasonable specificity.[31] The Licensing Board will reject the contention when: 1) it

24. *Id.*

25. 42 U.S.C. § 2239 (1976).

26. Green, *Public Participation in Nuclear Power Plant Licensing: The Great Delusion*, 15 WM. & MARY L. REV. 503, 510-13 (1974).

27. Power Reactor Dev. Co. v. International Union of Elec. Radio, & Mach. Workers, 367 U.S. 396 (1960). *See also* 2 Atomic Energy Law Rep., (CCH) ¶ 11,201 (1972); Palfrey, *Energy and the Environment: The Special Case of Nuclear Power*, 74 COLUM. L. REV. 1375, 1392-93 (1974).

28. Act of Sept. 2, 1957, Pub. L. No. 85-256, 71 Stat. 579, § 7. A later amendment to the Act dropped the requirement of a mandatory hearing during the license application stage. Act of Aug. 29, 1962, Pub. L. No. 87-615, 76 Stat. 409, § 2.

29. H.R. REP. No. 435, 85th Cong., 1st Sess., at 12 (1957).

30. Duquesne Light Co. (Beaver Valley, Unit 1), ALAB-109, 6 A.E.C. 243 (1973); Northern States Power Co. (Prairie Island, Units 1 & 2), ALAB-197, 6 A.E.C. 188 (1973), *aff'd*, BPI v. Atomic Energy Comm'n, 502 F.2d 424 (D.C. Cir. 1974).

31. 10 C.F.R. § 2.714(b) (1979).

constitutes an attack on applicable statutory requirements; 2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations; 3) it is nothing more than a generalization regarding the intervenor's views of what policies ought to apply; 4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or 5) it seeks to raise an issue which is not concrete or litigable.[32]

If the contention is adequately specific and appears to contain the basis within the contention itself, no separate basis is required.[33] The rationale for these requirements is the assumption that they assure a foundation for the contention sufficient to warrant further inquiry into the subject matter in the proceeding, and to give the other parties notice of what they must defend against or oppose.

In reality, this regulation stifles intervenors. In one current case, the NRC staff has argued that all twenty contentions filed by two separate intervenors failed to satisfy the requirements of specificity and basis.[34] In one contention, an individual residing close to the plant stated, "In the event of an accident, property values and the economic structure of the community would be damaged."[35] The NRC staff responded:

> The staff opposes this contention because the Intervenor has not provided any supporting factors or basis. In addition, there is no indication as to the meaning of "economic structure" and "the community." For these reasons, the contention is so vague and lacking in basis that it does not reasonably alert the parties as to the matters which they must address and therefore the contention should be rejected.[36]

The staff went on to question the meaning of "adverse effects" in the following contention. "Applicant has not demonstrated that there will be no adverse effects from low-level radiation."[37] The staff also attacked the terms "medical facilities" and "large numbers of people" as

32. Philadelphia Elec. Co. (Peach Bottom Atomic Power Station, Units no. 2 & 3), ALAB-216, 8 A.E.C. 13, 20-21 (1974).

33. Duke Power Co. (Amendment to Materials License SNM-1773, Transportation of Spent Fuel From Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-528, 9 N.R.C. 146 (1979).

34. *In re* General Elec. Co. (G.E. Morris Operation Spent Fuel Storage Facility) No. 70-1308, NRC Staff Statement of Position on the Contentions of the State of Illinois, at 18 (filed Nov. 20, 1979).

35. *Id.* at 13.

36. *Id.* at 13-14.

37. *Id.* at 14.

vague and uncertain. Staff responses of this nature reflect an attitude of tenacious legal defense with no concessions,[38] in sharp contrast to the congressional intent that there be full, free, and frank discussions.

NRC regulations also limit the jurisdiction of the Licensing Board, with the result that important issues are not discussed. For example, the regulations deny the Licensing Board jurisdiction to consider any "attack" on the validity of generic regulations.[39] The sole exception is that consideration may be given if the intervenor states "special circumstances with respect to the subject matter of the particular proceeding are such that application of the rule or regulation would not serve the purposes for which the rule or regulation was adopted."[40] The NRC has interpreted this regulation to mean that a contention is barred if it implies that NRC standards are inadequate.[41] Since regulations covering all foreseeable safety hazards presumably exist, the intervenor can be foreclosed from discussing safety. This leaves the intervenor with three alternatives. First, and most unlikely, he may attempt to show that normal plant operation will violate the standards. Second, he may attempt to challenge the validity of staff analysis regarding accidents. To achieve this, however, the intervenor must meet the requirements of specificity and basis, by showing that a specific accident with specific results can occur. Third, the intervenor can assert a safety hazard exists which is not covered by the regulations.[42]

If safety issues not covered by regulations come to the attention of the NRC, its understandable response is to institute rulemaking proceedings[43] to establish an appropriate regulation. If generic rulemaking is in progress, the Commission usually bans discussion of the issue in individual licensing proceedings. In one recent case, the Commission reaffirmed its position that the issue of emergency planning for people outside the immediate vicinity of a nuclear plant could not be discussed in a licensing hearing because it was the appropriate subject for generic rulemaking.[44] This policy results in both public frustration, and the issuance of licenses prior to resolution of all safety issues.

38. To understand the staff's attitude, one must consider the nature of the legal battle taking place in the licensing proceedings. See Hennessey, *Licensing of Nuclear Power Plants by the Atomic Energy Commission*, 15 WM. & MARY L. REV. 487, 494-95 (1974).

39. 10 C.F.R. § 2.758 (1979).

40. *Id.*

41. Potomac Elec. Power Co. (Douglas Point Nuclear Generating Station, Units 1 & 2), ALAB-218, 8 A.E.C. 79, 88-89 (1974).

42. Arguably, 10 C.F.R. § 2.758 permits this.

43. *See* notes 12-13 *supra* and accompanying text.

44. Public Service Co. of Indiana (Marble Hill) LBP 77-067, 8 N.R.C. 1101, 1119 (1977)

Another jurisdictional restriction arises out of the limited scope of the hearing. The Licensing Board may not consider issues beyond those set out in the notice of hearing.[45] If, therefore, the owner of a licensed facility seeks to renew its license for a twenty-year period, that which will happen twenty-five years from now is beyond the scope of the licensing hearing.[46] This approach, which is legally understandable, nevertheless prevents full discussion of the issues.

The overly restrictive interpretation of procedural regulations illustrates how discussion of safety is inhibited during the licensing process. The conclusion that this process has become meaningless as a method of airing intervenors' concerns is shared by the NRC's own Special Inquiry Group, formed to study the "Three Mile Island" incident. The Group stated:

> The vast majority of safety issues are resolved during negotiations between the NRC staff and representatives of the utility and vendor which take place while the staff is performing its design review. . . . The public and intervenor groups seldom play any meaningful role at this stage of the process.
>
> By the time of the public hearing, the NRC's licensing staff has typically won the acquiescence of the utility applicant for most or all of the changes the staff deems necessary . . . . At this point, the NRC staff appears as advocate of the final design; in other words, the staff and the applicant are on the same side at the hearing because *their* differences have already been resolved.
>
> Intervenor groups, which have become more vocal and better funded in recent years, can seldom bring to the hearings either the technical expertise or the resources to make an effective challenge on technical safety issues to the combined front presented by the NRC staff and the applicant's and vendor's experts.
>
> Even if intervenors were able to contest safety issues effectively, they would find it difficult to reach an array of licensing actions important to safety that are taken by the NRC staff outside of or peripheral to the formal license authorization process.[47]

(citing New England Power Co. (NEP Units 1 & 2) & Public Service Co. of New Hampshire (Seabrook Units 1 & 2), ALAB-290, 15 N.R.C. 733, 747 (1977)).

45. 10 C.F.R. §§ 2,104(b), 2.502 (1979).

46. G.E. Morris, note 33 *supra*, Transcript of Pre-hearing Conference (Feb. 29, 1980) (on file with the author).

47. ROGOVIN REPORT, note 22 *supra*, at 139 (emphasis in original).

The Inquiry Group concluded, "Insofar as the licensing process is supposed to provide a publicly accessible forum for the resolution of all safety issues relevant to the construction and operation of a nuclear plant, *it is a sham.*"[48]

The Kemeny Commission,[49] appointed by President Carter, also found "serious inadequacies" in the licensing procedure. Specifically, the Kemeny report criticized the restrictive regulations that precluded discussion of appropriate issues in licensing proceedings.[50] The report concluded that the NRC failed to ensure the safety of nuclear power plants, and recommended complete restructuring of the agency.[51]

B. *Rulemaking: The Commission Gets to Generalities*

Aside from those rulemakings that deal with procedural regulations, the NRC reserves rulemaking for general issues: those matters that are of common concern for some or all facilities licensed by the agency. Rulemaking may be initiated by the Commission, by recommendation of another federal agency, or by petition of any other interested person.[52] While the interested party may request a rulemaking, no right to a proceeding exists.[53] This situation frustrates attempts to discuss publicly significant issues and engenders distrust in the NRC.

Such frustration was experienced by the Natural Resources Defense Council on November 8, 1976, when it filed a petition for a rulemaking proceeding. The petition requested the NRC

> (1) to determine whether radioactive wastes can be generated in nuclear power reactors and subsequently disposed of without undue risk to public health and safety, and (2) to refrain from acting finally to grant pending or future requests for operating licenses until such time as this definitive finding of safety can be and is made.[54]

In denying the petition, the NRC stated:

> [T]he Commission has concluded that it is not obligated to

48. *Id.* (emphasis in original).

49. REPORT OF THE PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND, THE NEED FOR CHANGE: THE LEGACY OF TMI (Oct., 1979).

50. *Id.* at 17-18.

51. *Id.* at 22.

52. 10 C.F.R. § 2.801 (1979).

53. "No hearing will be held on the petition unless the Commission deems it advisable." 10 C.F.R. § 2.803 (1979) Courts have upheld this discretionary power. *See* Illinois v. NRC, 591 F.2d 12 (7th Cir. 1979); Natural Resources Defense Council v. NRC, 582 F.2d 166 (2d Cir. 1978).

54. Natural Resources Defense Council Petition for Rulemaking, No. PRM-50-18 (Nov. 8, 1976).

> make a "definitive" finding, nor is it appropriate to make the "definitive" finding requested by NRDC; the safe methods of high-level waste disposal are now available prior to the licensing of a reactor. Because the petition seeks a finding that safe waste disposal can be accomplished immediately, the Commission has determined that the rulemaking petition should be denied. The Commission notes that prior to any licensing of high-level waste disposal facilities, a detailed finding concerning the safety of the proposed facilities will be made. There is, we believe, a clear distinction between permanent disposal of wastes and their interim storage. The Commission must be assured that wastes . . . can be safely handled and stores as they are generated . . . . But it is neither necessary nor reasonable for the Commission to insist on proof that a means of permanent waste disposal is on hand at the time reactor operation begins, so long as the Commission can be reasonably confident that permanent disposal (as distinguished from continued storage under surveillance) can be accomplished safely when it is likely to become necessary.[55]

The Commission stated that it could be "reasonably confident" because "there is now a coordinated federal program to develop an actual disposal facility."[56] The procedural flaw apparent in this process is that the determination of the NRC's confidence is made without public participation or ventilation of the issues. The NRDC appealed the decision, but the court upheld the NRC's authority to deny the petition without a hearing.[57] Thus, the issue was not publicly resolved.

As a result of the denial, however, the NRC's Appeal Board did consider the issue to have been resolved. In 1978, two separate cases were consolidated for hearing before the Appeal Board. The licensing

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55. Denial of Petition for Rulemaking, No. PRM-50-18, 42 Fed. Reg. 34,391 (1977).

56. *Id.* at 34,393. The effectiveness of the "coordinated federal program" may be questioned legitimately. President Ford announced one major program in 1976, which President Carter drastically altered in 1977. President Carter has modified the program further this year. *See* note 1, *supra.*

57. Natural Resources Defense Council, Inc. v. NRC, 582 F.2d 166 (2d Cir. 1978). In upholding the Commission's refusal to institute a rulemaking proceeding, the court limited itself to statutory interpretation, and restated the narrow judicial role in reviewing agency action. To an NRDC contention that the Atomic Energy Act required an affirmative determination regarding permanent waste disposal, the court responded:

> It is our conclusion that NRDC simply reads too much into the AEA. Indeed, if the AEC had interpreted the statute to require the affirmative determination regarding permanent disposal of high-level waste sought by NRDC, no commercial production or utilization facilities would be in operation today. We are satisfied that Congress did not intend such a condition. If it did, the silence from Capital Hill has been deafening.

Id. at 171.

boards in each case had granted permission to utilities to expand the capacity of their on-site spent fuel pools.[58] Intervenors contended unsuccessfully to the Licensing Board that uncertainty as to the feasibility of ultimate solutions for the disposal of commercial nuclear wastes raised the possibility that the reactor sites might become long-term, and possibly indefinite, storage sites. They argued that this situation required the Board to consider the safety and environmental implications of indefinite storage on site.[59]

The Appeal Board ruled that the issue was foreclosed by the NRC denial of the NRDC's petition. The Board cited the Commission's "reasonable confidence" that wastes can and would be disposed of safely. Acknowledging that the NRC's conclusion was not made in any rulemaking or adjudicatory proceeding, the Board still felt it deserved effect as, "a policy declaration that, for the purposes of licensing action, it both can and should be presumed that there will be spent fuel repositories available "when needed"—*i.e.*, well before the termination of the Prairie Island or Vermont Yankee operating licenses."[60] The Commission declined to review the Appeal Board's decision, although one Commissioner did separately attack the Board's use of the NRC denial of the rulemaking petition.[61]

The intervenors appealed the granting of the license amendment to the Court of Appeals for the District of Columbia,[62] which interpreted the controling issue to be "whether there has been an NRC disposition in generic proceedings that is adequate to dispose of the objections to the licensing amendments."[63] The court concluded:

> [T]he NRC in its denial of rulemaking chose not to undertake the kind of comprehensive inquiry into the question of disposal solutions that would be required to give content to a "generic" determination. NRC did state its "reasonable confidence" that solutions would be available when needed. While based on a description of current federal efforts in the

58. Spent fuel pools are water filled pools used for "interim" storage of spent fuel rods. The water acts as a coolant and as a shield against the high-level radiation of the rods. The original design of the pools called for limited storage, usually 1 1/3 times the capacity of the reactor. Since no permanent storage facilities exist, however, utilities must exceed the designed capacity of these pools. To rerack or expand a pool to provide additional storage requires an amendment to the license.

59. 7 N.R.C. 41 (1978).

60. Minnesota v. NRC, 602 F.2d 412, 416 (D.C. Cir. 1979).

61. *Id.*

62. *Id.*

63. *Id.* at 418.

> area, NRC's "assurances" are not the product of a rulemaking record devoted expressly to considering the questions.[64]

Because of the failure by the NRC to consider the issue, the court remanded the two licensing actions to the Commission for consideration of whether an off-site storage solution for nuclear wastes will be available by the years 2007-09, the approximate time the licenses would expire. If the Commission could not be reasonably sure off-site storage would be available, it was ordered to determine whether that waste can be stored at the sites beyond those dates until an off-site solution is available.[65]

In its decision, the court of appeals affirmed the legitimacy of the issue of the availability of permanent storage facilities in licensing hearings. In response to the decision, the NRC published a notice of proposed rulemaking on October 25, 1979.[66] The NRC stated that the purpose of the proceeding was "to reassess its degree of confidence that radioactive wastes produced by nuclear facilities will be safely disposed of, to determine when any such disposal will be available, and whether such wastes can be safely stored until they are safely disposed of."[67] This language is familiar because the issue is identical to that which the Natural Resources Defense Council addressed in its petition for a rulemaking on November 8, 1976. After three years of NRC opposition, consideration of the issue has finally commenced, but only after action by the court of appeals. Such recalcitrance and delay on the part of the NRC fails to instill public trust and confidence in the regulatory process.

Now that the proceeding has commenced, certain of its aspects illustrate general flaws in the rulemaking process. First, discussion of the issue is now barred in individual adjudicatory proceedings.[68]

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64. *Id.* at 417.

65. *Id.* at 418.

66. 44 Fed. Reg. 61,372 (1979). In his Feb. 12, 1980 message, President Carter referred to this proceeding:

> The Nuclear Regulatory Commission now has underway an important proceeding to provide the Nation with its judgment on whether or not it has confidence that radioactive wastes produced by nuclear power reactors can and will be disposed of safely. I urge that the Nuclear Regulatory Commission do so in a thorough and timely manner and that it provide a full opportunity for public, technical, and government agency participation.

President's Message, note 1, *supra* at 300.

67. 44 Fed. Reg. 61,372-73 (1979).

68. In the notice of rulemaking, the NRC stated:

> During this proceeding the safety implications and environmental impacts of radioactive waste storage on-site for the duration of a license will continue to be subjects for adjudication in individual facility licensing proceedings. The Commission has decided,

Second, the complexity of the issue will overwhelm many interested parties of limited expertise or financial resources.[69] Finally, the NRC is "locked-in" to a decision. A negative finding by the Commission would constitute a rejection of President Carter's program as unrealistic; it would necessitate reopening as many as fifty spent fuel storage proceedings; and it would be an admission that the NRC had failed to adequately perform its duty to protect public safety. Under such pressures, the outcome seems preordained.

The Rogovin Report[70] leveled strong criticism at the NRC regarding rulemaking proceedings. It stated:

> Consideration of "generic safety issues," such as the adequacy of a standard design feature to instigate certain not-yet-analyzed accidents, generally is not included in the licensing proceedings. Theoretically, these issues are dealt with administratively by the NRC staff and the ACRS, or by policy decisions implemented in rulemaking or elsewhere in the NRC. In practice, it appears that many of these issues do not get meaningful attention anywhere.[71]

The lack of "meaningful attention" to critical issues breeds mistrust of the NRC, and causes parties to look elsewhere for relief. Unfortunately, well established doctrines of administrative law have prevented such redress.

III. JUDICIAL REVIEW: LEGAL ETIQUETTE DICTATES RESTRAINT

The forum in which parties naturally seek relief for grievances against a federal agency is the court system. Rules of judicial restraint, however, restrict the ability of judges to force the NRC to consider

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however, that during this proceeding the issues being considered in the rulemaking should not be addressed in individual licensing proceedings.

44 Fed. Reg. at 61,373 (1979). *See also* General Elec. Co. (G.E. Morris Operation Spent Fuel Storage Facility) No. 70-1308, NRC Staff Statement of Position on the State of Illinois at 18 (filed Nov. 20, 1979).

69. The NRC recently filed an "information sheet" regarding the "databank on waste disposal" it is creating for use by interested parties. The NRC itself is contributing a bibliography containing 19,000 references. The Department of Energy's bibliography contains 11,922 references. In addition, there will be more than 540 actual documents in the databank. *See* 44 Fed. Reg. at 61,374 (1979). Parties will be given three months to peruse these documents before being required to submit testimony. It is also interesting to note that despite more than 20 years of research which yielded the above noted references, there is no certain technology available for permanent storage.

70. ROGOVIN REPORT, note 22 *supra*.

71. *Id.* at 139.

issues. A party seeking relief faces two difficulties: access to the courts, and the limited extent of judicial review.

A. *Exhaustion of Remedies and Primary Jurisdiction: "It's up to the Agency, so go ask them."*

To gain access to the court a party must first exhaust all administrative remedies available. This principle applies, despite a strong probability that the agency will deny relief,[72] or a denial of relief by the agency under similar circumstances in the past.[73] Additionally, under the concept of primary jurisdiction the court will not substitute its judgment for that of the agency in an area of the agency's expertise.

In *Nader v. Ray*,[74] the district court ruled that the principles of both primary jurisdiction and exhaustion of remedies required denial of relief to petitioning environmental groups. The plaintiffs alleged that the NRC had a statutory obligation to revoke twenty nuclear plant operating licenses because of safety defects related to the emergency core cooling system, which was the subject of a generic rulemaking proceeding. Admitting failure to request relief from the NRC, the plaintiffs argued that such an effort would be futile because discussion of individual reactors was forbidden in the rulemaking, and because NRC regulation did not attack the interim acceptance criteria which were in effect during the rulemaking. The court rejected this argument and held that the principle of exhaustion of remedies applied.

> No rule of the AEC precludes plaintiffs from raising in individual adjudicatory proceedings the question of reactor compliance with the requirements of either General Design Criterion 35 or the IAC. There is no evidence whatever that had plaintiffs sought to raise before the Commission the issue that they raised in this action the Commission would have denied relief because of a definite policy or statement adverse to plaintiffs' position. Under these circumstances, plaintiff's failure to exhaust their administrative remedies cannot be excused on the ground of futility.[75]

In addition, the court cited the doctrine of primary jurisdiction. "This case involves highly complex matters of nuclear reactor technology which . . . should be resolved in the first instance by the AEC."[76] The

72. Spanish Internat'l Broadcasting Co. v. FCC, 385 F.2d 615, 626 (D.C. Cir. 1967).
73. Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 165-66 (1967).
74. 363 F. Supp. 946 (D.D.C. 1973).
75. *Id.* at 954 (citations omitted).
76. *Id.* at 953.

court concluded, "Even if the agency were not conducting such a [rulemaking] proceeding, this Court would nevertheless have ample justification to conclude that the highly technical matters here in issue should be resolved in the first instance by the agency with expertise in those matters."[77]

Primary jurisdiction and exhaustion of remedy principles were recently applied in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor.*[78] In this case, environmental groups filed suit in federal district court against Three Mile Island Nuclear Reactor (TMI), the NRC, and private companies owning TMI. The utilities, with the NRC's approval, had constructed and commenced testing of an Epicor II decontamination system at the reactor site. The NRC had ruled this action required no amendment of the plant's operating license. The plaintiffs alleged that construction and use of Epicor II required a license amendment[79] and preparation of an environment impact statement (EIS).[80] The plaintiffs further alleged that operation of Epicor II could possibly cause discharge of radioactive pollutants into a nearby river, which would violate the Clean Water Act of 1977.[81] Noting the plaintiffs' failure to request a hearing from the NRC,[82] the court stated:

> It is a well established principle of law that a plaintiff must seek redress of grievances with the appropriate administrative agency, in this case the NRC, prior to asking the court to take action on matters within the jurisdiction of an agency. This requirement has developed to prevent premature interference with agency processes, and to allow the agency the opportunity to review its own decision.[83]

Plaintiffs attempted to avoid the exhaustion of remedies problem by arguing that the NRC had clearly violated nondiscretionary duties under NEPA and its own regulations. The court's response was to de-

77. *Id.* at 953.

78. 485 F. Supp. 81 (M.D. Pa. 1979).

79. Under NRC regulations, there are four circumstances which require amendment to a license: (1) when an alteration constitutes a change from the technical specifications previously incorporated in the license, 10 C.F.R. § 50.54(n) (1979); (2) when an "unreviewed safety question" is involved, 10 C.F.R. § 50.59(a) (1979); (3) when a "significant hazards consideration" is involved, *id.*; or (4) when a "major alteration of a licensed facility" is involved. 10 C.F.R. § 50.91 (1979).

80. The plaintiffs based this contention on the fact that construction of the decontamination system was major federal action within the meaning of NEPA, 42 U.S.C. § 4332 (1976).

81. Clean Water Act of 1977, 33 U.S.C. § 1311(f) (Supp. 1977).

82. Any person may file a request for the NRC to institute a proceeding to modify, suspend, or revoke a license. 10 C.F.R. § 2.206 (1979).

83. 485 F. Supp. at 86 (citations omitted).

fer to the technical expertise of the NRC. Concerning the EIS, the court said, "The situation created by the accident at TMI is highly complex. . . . It would be an unjustified interference with NRC authority for this court to intervene in the present instance, when the agency itself may decide to grant the plaintiffs the relief they seek."[84] The court concluded that it was not in a position to judge the NRC's actions because "the technical expertise needed to evaluate whether or not the recovery activities are subject to permits or licensing amendments exists within the NRC."[85] The district court then dismissed the complaint.

The doctrines of exhaustion of remedies and primary jurisdiction serve a useful purpose: They force parties to initiate their complaints in the appropriate forum. Their unfortunate side-effect is to deny a subsequent forum for discussion of issues where the primary open forum has been denied by use of restrictive procedure. Provision for review of NRC orders has been provided by law,[86] but appellate courts have been extremely reluctant to rule against NRC determinations. Indeed, review provides little solace for the intervenor who would seek to address issues of larger scope than those allowed by the NRC.

B. *Judicial Review: Fast Review and Little Relief*

Extensive judicial involvement in the nuclear licensing process began with the 1971 decision of *Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission*.[87] This decision required the NRC to issue an environmental impact statement[88] for each license it granted. The adequacy of the EIS subsequently became a major issue in licensing proceedings.

The amount of judicial involvement prior to *Calvert Cliffs* may be

84. *Id.*

85. *Id.* at 87.

86. Congress designated the forum for review of certain final orders of the NRC when it enacted 28 U.S.C.A. § 2342 (West 1979), which provides "[t]he four of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . (4) all final orders of the Atomic Energy Commission made reviewable by section 2239 or title 42. . . ." *Id.* 42 U.S.C. § 2239 (1976) makes reviewable: any proceeding for the granting, suspending, revoking, or amending of any license or construction permit or application to transfer control, and any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees. *Id.*

87. 449 F.2d 1109 (D.C. Cir. 1971). *See* Breyer, *Vermont Yankee and the Court's Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1803, 1838-40 (1978); and Palfrey, *Energy and the Environment: The Special Case of Nuclear Power*, 74 COLUM. L. REV. 1375, 1392-95 (1974).

88. The National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1976 and Supp. I 1977), requires an environmental impact statement for any major federal action which will have a significant effect on the quality of the human environment.

a result in part of the fact that until 1968, there were few interventions in licensing proceedings.[89] It was also not until 1969 that comprehensive environmental legislation was passed. The National Environmental Policy Act (NEPA)[90] gave would-be intervenors a basis for raising environmental issues in licensing proceedings. Much of the litigation over NRC decisions has come before the Court of Appeals for the District of Columbia. That court attempted to create an expansive role for the judiciary in reviewing agency action.[91] The Supreme Court rejected this approach in the *Vermont Yankee* decision.[92]

1. *Vermont Yankee*: "Only whether they did it is relevant, not whether they did it right."

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council[93] stands for the proposition that the NRC has broad discretion in carrying out its duties and is relatively immune from judicial scrutiny if it meets the statutory requirements of the Administrative Procedure Act. *Vermont Yankee* consisted of two appeals consolidated for argument and decision on the issue of the proper scope of judicial review of licensing procedures. In both cases the appellate court had reversed the NRC's decision to grant licenses to nuclear power plants. In the lead decision, *Vermont Yankee*, the appellate court required the NRC to consider certain environmental issues in individual hearings if no effective rulemaking had taken place. The NRC had issued a ge-

89. Green, *Public Participation in Nuclear Power Plant Licensing: The Great Delusion*, 15 WM. & MARY L. REV. 503, 512 (1974).

90. 42 U.S.C. §§ 4331-4367 (1976 & Supp. II 1978).

91. Scalia, *Vermont Yankee v. the APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 348-52 (1978).

92. 435 U.S. 519 (1978).

93. 435 U.S. 519 (1978). The implications of this case are either awesome or nonexistent, depending upon who is analyzing the case. *See* Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); SCALIA, NOTE 90 *supra*; Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978). *See also* 1 K. DAVIS, ADMINISTRATIVE LAW § 635 (1978). Davis' view of *Vermont Yankee* is by far the harshest.

> The *Vermont Yankee* opinion is largely one of those rare opinions in which a unanimous Supreme Court speaks with little or no authority. The Court lacks power to change the law through sweeping generalizations that are unsupported by close analysis. When the Court is unanimous, it has enormous power to change the law by carefully considering all facets of the problem before it and by systematically answering the reasonable questions about the problem than an informed person would raise. The *Vermont Yankee* opinion is not that kind of opinion.

Id. at § 637, p. 616.

neric rule on the issue. The appellate court, however, severely criticized the procedures used by the NRC in adopting the rule:

> Not only were the generalities relied on in this case not subject to rigorous probing—in any form—but when apparently substantial criticisms were brought to the Commission's attention, it simply ignored them, or brushed them aside without answer. Without a thorough exploration of the problems involved in waste disposal, including past mistakes, and a forthright assessment of the uncertainties and differences in expert opinion, this type of agency action cannot pass muster as reasoned decisionmaking.[94]

The court overturned the rule and remanded *Vermont Yankee* to the Commission for further proceedings. In the second case, *Consumer's Power*, the court found the environmental impact statement critically defective because it failed to examine energy conservation as an alternative to plant construction.[95] The court further ruled that fuel cycle issues, similar to those raised in *Vermont Yankee*, should be given appropriate consideration on remand.[96]

By the time the case reached the Supreme Court, the NRC had begun generic rulemaking procedures in response to the appellate decisions. The Court, however, denied motions for dismissal because of mootness:

> As we read this opinion of the Court of Appeals, its view that reviewing courts may in the absence of special circumstances justifying such a course of action impose additional procedural requirements on agency action raises questions of such significance in this area of law as to warrant our granting certiorari and deciding the case.[97]

Having established the case's significance, the Court gave its interpretation of the lower court's ruling:

> After a thorough examination of the opinion itself, we conclude that while the matter is not entirely free from doubt, the majority of the Court of Appeals struck down the rule because of perceived inadequacies of the procedures employed in the rulemaking proceedings. The court first determined the intervenors' primary argument to be "that the

94. Natural Resources Defense Council v. NRC, 547 F.2d 633, 653 (D.C. Cir. 1976), *rev'd* 435 U.S. 519 (1978).

95. Aeschliman v. NRC, 547 F.2d 622, 628 (D.C. Cir. 1976).

96. *Id.* at 632.

97. 435 U.S. at 537 n.14.

> decision to preclude 'discovery or cross-examination' denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process." The court then went on to frame the issue for decision thus: "Thus, we are called upon to decide whether the procedures provided by the agency were sufficient to ventilate the issues." The court conceded that absent extraordinary circumstances it is improper for a reviewing court to prescribe the procedural format an agency must follow, but it likewise clearly thought it entirely appropriate to "scrutinize the record as a whole to insure that genuine opportunities to participate in a meaningful way were provided. . . ." The court also refrained from actually ordering the agency to follow any specific procedures, but there is little doubt in our minds that the ineluctable mandate of the court's decision is that the procedures afforded during the hearings were inadequate. This conclusion is particularly buttressed by the fact that after the court examined the record, and declared it insufficient, the court proceeded to discuss at some length the necessity for further procedural devices or a more "sensitive" application of those devices employed during the proceedings. The exploration of the record and the statement regarding its insufficienty might initially lead one to conclude that the court was only examining the sufficiency of the evidence, but the remaining portions of the opinion dispel any doubt that this was not the sole or even the principal basis for the decision. Accordingly, we feel compelled to address the opinion on its own terms, and we concluded that it was wrong.[98]

The Court then set out its reasoning. "Absent constitutional constraints or extremely compelling circumstances, the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." ' "[99] It went on to say that the court of appeals' pressure on the agency to use additional procedural devices disrupts the statutory scheme of the APA, and "not only encourages but almost compels the agency to conduct all rulemaking proceedings with the full panoply of procedural devices normally associated only with adjudicatory hearing."[100] The Court then stated, "the adequacy of the 'record' in this type of proceeding is not correlated directly to the

98. *Id.* at 540-42 (quoting 547 F.2d at 643-44).
99. *Id.* at 543.
100. *Id.* at 547.

type of procedural devices employed, but rather turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes."[101] The summation stressed the Court's belief that the appellate court had exceeded its powers:

> In short, nothing in the APA, NEPA, the circumstances of this case, the nature of the issues being considered, past agency practice, or the statutory mandate under which the Commission operates permitted the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case.[102]

The Court reversed the court of appeals and remanded the case for review of the rule as the Administrative Procedure Act provides.[103] The decision ended with the Court reversing the court of appeals on all other issues raised on the grounds that the lower court went far beyond the acceptable limits of judicial review. The instant significance of the decision was that the NRC, if it so elected, could conduct its generic rulemaking within minimum statutory procedural requirements and be safe from judicial interference. The long-term effect has been to restrict judicial examination of NRC actions.

2. After *Vermont Yankee*: "For Relief Take Aspirin, etc."

Since the Court of Appeals for the District of Columbia Circuit is the forum in which most major administrative law cases are presented, its reaction to *Vermont Yankee* assumes great significance. That court's decision in *Porter County Izaak Walton League v. NRC*[104] represented one of the first opportunities for interpretation. In that case, intervenors challenged NRC procedures regarding requests for adjudicatory proceedings. The court of appeals rejected the challenge in a way that may limit the effect of *Vermont Yankee* to the nuclear area, as opposed to the administrative area as a whole.

> The NRC staff has responded to the safety concerns that were initially identified by the manufacturer. The safety questions will ultimately be tested in adjudicative proceedings when the operating license is under consideration. That is the

101. *Id.*
102. *Id.* at 548.
103. *Id.* at 549.
104. 606 F.2d 1363 (D.C. Cir. 1979).

> safety-assuring procedure that Congress has devised after due reflection. We have been cautioned against projecting a legislative intent to insert additional procedural requirements in the field of atomic energy regulation, notwithstanding the transcendent importance of the subject-matter, because this is a field that receives the intense and continuing attention of the legislators and their staffs, and the courts must give particular deference to the legislative balancing of the substantive and procedural considerations. As to the constitutional contentions of petitioners, the principles already announced by the Court are dispositive.[105]

The concept of particular deference to the legislative scheme in the nuclear energy field limits *Vermont Yankee*. It, nonetheless, isolates the court from any true review of agency actions or procedures.

Other appellate courts have adopted this "hands-off" policy. In *Illinois v. NRC*,[106] the Seventh Circuit interpreted *Vermont Yankee* in the context of their decisions.

> In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, the Court recently repeated a long established administrative law principle: "Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agency to which Congress had confided the responsibility for substantive judgments." Congress has indeed bestowed broad discretion upon the Commission. "Both the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974 confer broad regulatory functions on the [Nuclear Regulatory] Commission and specifically authorize it to promulgate rules and regulations it deems necessary to fulfill its responsibilities under the Acts." The Commission's regulatory scheme "is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."[107]

As a practical matter, freedom from close prescription amounts to free rein to operate within the minimal requirements of the Administrative Procedure Act.

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105. *Id.* at 1372 (citing Vermont Yankee, 435 U.S. at 558).

106. 591 F.2d 12 (7th Cir. 1979).

107. *Id.* at 15 (quoting Public Service Co. v. NRC, 582 F.2d 77 (1st Cir. 1978); Siegel v. AEC, 400 F.2d 778, 783 (U.S. App. D.C. 1968).

A recent Supreme Court decision has expanded the concepts of *Vermont Yankee* in an area of critical importance to intervenors in NRC proceedings: the adequacy of environmental impact statements.[108] In *Vermont Yankee*, the Court had injected dictum concerning intervenor's responsibility under NEPA:

> [W]hile it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions. This is especially true when the intervenors are requesting the agency to embark upon an exploration of uncharted territory, as was the question of energy conservation in the late 1960's and 1970's.[109]

The Court seemed to be saying that if an intervenor thought of a problem before the Commission considered the area a problem, the intervenor had the burden to prove forcefully the matter worthy of consideration.[110] Later in the decision, the Court defined the limited role of courts in reviewing environmental impact statements:

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function. NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.[111]

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108. *See* Strycker's Bay Neighborhood Council v. Karlen, 100 S. Ct. 497 (1980).

109. 435 U.S. at 553.

110. One of the complications in the *Vermont Yankee* litigation occurred when the Congress on Environmental Quality (CEQ) required "energy conservation" to be considered in an environmental impact statement. This ruling by the CEQ came after the NRC granted a license and refused to consider energy conservation in the environmental imapct statement. The court of appeals thought the consideration of energy conservation significant enough to require reopening the licensing proceeding. The Supreme Court rebuked this position with the quote in the text.

111. 435 U.S. at 557-58 (emphasis in original).

The Court used this dictum to support the decision in *Strycker's Bay Neighborhood Council v. Karlen*.[112] In this case, the Court overturned a lower court finding that the Secretary of Housing and Urban Development had arbitrarily dealt with an environmental impact statement. In its ruling, the Court stated:

> *Vermont Yankee* cuts sharply against the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."
>
> In the present case there is no doubt that HUD considered the environmental consequence of its decision to redesignate the proposed site for low-income housing. NEPA requires no more.[113]

This holding is significant in two respects: It limits judicial review of the adequacy of environmental impact statements; and it applies the strong mandate of judicial restraint to an adjudicatory setting. The Supreme Court seems to give little room for a lower court to determine the adequacy of an environmental impact statement when the lower court is limited to considering whether NEPA's procedural requirements were met. The dissent, by Justice Marshall, disagrees with the majority reasoning and interpretation of *Vermont Yankee*:

> Thus *Vermont Yankee* does not stand for the proposition that a court reviewing agency action under NEPA is limited solely to the factual issues of whether the agency "considered" environmental consequences. The agency's decision must still be set aside if it is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," and the reviewing court must still insure that the agency "has taken a 'hard look' at environmental consequences."[114]

Considering the complex environmental issues relating to storage of nuclear waste, Justice Marshall's dissent would be the far more reasonable approach to reviewing NRC actions on an environmental im-

112. 100 S. Ct. 497 (1980).

113. *Id.* at 500 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) and citing FPC v. Transcontinental Gas Pipeline Corp., 423 U.S. 326 (1976)).

114. *Id.* at 501 (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976)).

pact statement for licensing a disposal facility. The majority decision removes a certain healthy pressure to consider fully the environmental aspects of the problem. The decision also relieves pressure in respect to judicial review of adjudicatory hearing. The core of *Vermont Yankee* was the limit of judicial review in generic rulemaking. This left open the possibility of active judicial review in the adjudicatory procedure. *Strycker's Bay* forecloses that possibility by extending the ruling of *Vermont Yankee* to adjudicatory proceedings. This leaves aggrieved parties with little hope of relief from reviewing courts once the agency has acted.

IV. PREEMPTION: YOU CAN HAVE THE ONLY GAME IN TOWN IF YOU MAKE THE RULES

If you fail before the NRC, and find no relief in the federal court of review, you may then turn to local government and there confront the doctrine of preemption. This doctrine derives from the supremacy clause of the Constitution which provides that the Constitution and laws of the United States shall be the supreme law of the land.[115] According to this doctrine, a state law cannot stand if it poses "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[116] How does the doctrine of preemption affect state regulation in the nuclear energy field?[117]

A. *The Doctrine: The Federal Government Calls "Dibbs."*

Defining preemption in terms of state "obstacles" to congressional objectives is relatively simple. Determining the congressional objectives and deciding to what extent state regulations pose obstacles is far more complex. Specifically, one begins with "the assumption that the historic police powers of the state were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress."[118] The presumption of validity is tested against the congressional purpose, which is determined in several ways:

(1) The scheme of federal regulation may be so pervasive as

115. U.S. CONST. art. VI, cl.2.

116. Goldstein v. Calif., 412 U.S. 546, 561 (1973).

117. For the purposes of this article, we intend to state briefly the doctrine and its effect. For everything you ever wanted to know about preemption, but were afraid to ask, *see* Murphy & Pierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 13 COLUM. L. REV. 392 (1976).

118. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

> to make reasonable the inference that Congress left no room for the states to supplant it.[119]
>
> (2) The act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.[120]
>
> (3) Congress specifies in a statute the extent to which state laws are preempted to achieve the goals of legislation.[121]

Examples (1) and (2) illustrate implied preemption; example (3) illustrates express preemption.

Most Supreme Court cases confronting the preemption issue involve implied preemption. This is simply because Congress rarely expresses the intent to preempt the field in legislation. The Court, therefore, must apply its own, sometimes inconsistent, standards to evaluate conflicts between state and federal laws and to the question of the extent of federal involvement in a particular area.[122] Express preemption provisions do not necessarily eliminate the need for court interference, as it is often necessary to have a determination of the scope of a provision. For example, the Second Circuit analyzed the legislative history of the Federal Hazardous Substances Act[123] to decide the scope of the congressional intent:

> It is the intent of Congress to supersede any and all laws of the states and political subdivisions thereof insofar as they . . . provide for the precautionary label of any substance or article intended or suitable for household use . . . which differ from the requirements or exemptions of this Act or the regulations or interpretations promulgated thereto.[124]

After examining the history of the Act, the court decided that "precautionary labels" included labels required for identification by local statute.[125] Thus, even statutes bearing expressions of congressional intent to preempt may encounter difficulties in application of the preemption doctrine. In the nuclear energy field, however, courts have confronted

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119. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1944).
120. Hines v. Davidowitz, 312 U.S. 52 (1941).
121. Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956).
122. For analysis of the Court's preemption decisions, *see* Hirsch, *Toward A New View of Federal Preemption*, 1972 U. ILL. L.J. 515; Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).
123. 15 U.S.C. §§ 1261-1274 (1976).
124. *Id.* at § 1261.
125. Chemical Specialties Manuf. Ass'n, Inc. v. Lowery, 452 F.2d 431 (2d Cir. 1971).

the issue of preemption and have determined that the doctrine precluded state regulation of radioactive materials and facilities.

B. Northern States Power: *Power Is a Fascinating Thing—Congress Has It, Utilities Generate It, and States Lack It.*

The leading case on federal preemption in the nuclear area is *Northern States Power Co. v. Minnesota*.[126] The sole issue in the case was "whether the federal government, through the United States Nuclear Regulatory Commission, had exclusive authority to regulate the radioactive waste releases from nuclear power plants so as to preclude Minnesota from exercising any regulatory authority over the release of such discharges from the Monticello plant."[127] The controversy arose when the Northern States Power Company applied to the Minnesota Pollution Control Agency for a waste disposal permit for the Monticello plant. The permit was issued subject to the specified conditions regulating the level of radioactive liquid and gaseous discharges and requiring monitoring programs for the detection of such releases. The AEC had already acted under federal law to impose far less stringent conditions on the utility in the same area. The AEC issued Northern States Power Company a provisional operating license without reference to the state requirements. The company sought a declaratory judgment ruling that the AEC was vested with exclusive control in the area and that Minnesota was precluded from regulating plant operation.

When the case came before the district court, it found that the "unambiguous mandate" of section 2021 of the Atomic Energy Act expressly preempted any regulation by Minnesota.[128] The Eighth Circuit disagreed, stating "[N]o provision of the Atomic Energy Act expressly declares that the federal government shall have the sole and exclusive authority to regulate radiation emissions from nuclear power plants."[129] The court found it necessary to determine "whether Congress has nevertheless manifested an intent to displace concurrent state regulation in the field."[130] After examination, the court noted that nuclear energy had begun as a government monopoly and the AEC licensing process remained the sole access to utilization of atomic

126. 447 F.2d 1143 (8th Cir. 1971), *aff'd per curiam*, 405 U.S. 1035 (1972).
127. *Id.* at 1144.
128. 320 F. Supp. 172, 177 (D. Minn. 1970).
129. 447 F.2d at 1147.
130. *Id.*

energy. The court attached special significance to a 1959 amendment to the AEA,[131] which it viewed as an acknowledgement that the federal government possessed exclusive control of regulation of radioactive hazards.[132] Various factors motivated the final conclusion:

> We are of the firm opinion that the mere enactment of elaborate and detailed legislation authorizing turnover agreements to effect a cession to the states of regulatory authority over some activities associated with radiation hazards, and specifically prohibiting the relinquishment of authority over others, in itself evinces an inescapable implication that the federal government possessed exclusive authority absent the agreements authorized by the 1959 amendment.
>
> Despite our strong belief that § 2021 makes it abundantly clear that Congress intended federal occupancy of regulations over all radiation hazards except where jurisdiction was expressly ceded to the states, if any doubt remains, it is affirmatively resolved by the wealth of legislative history accompanying the 1959 amendment.[133]

The Eighth Circuit then affirmed the district court decision and barred Minnesota from regulating radioactive discharges from Monticello.

Despite the *Northern States* decision, several states have attempted to legislate to regulate nuclear power plant siting and usage,[134] and transportation of nuclear wastes.[135] The validity of such legislation is doubtful because of the preemption doctrine. The most recently decided challenge to such state laws, *Pacific Legal Foundation v. State Energy Conservation & Development Commission*,[136] again found the federal law to preempt the field. Thus, the preemption doctrine has

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131. Act of Sept. 23, 1959, Pub. L. No. 86-373, 736 Stat. 691, *codified at* 42 U.S.C. § 2138 (1976).

132. 447 F.2d at 1150.

133. *Id.*

134. See Murphy & Pierre, *supra* note 116, for a discussion of various legislative proposals. Those authors conclude:

> Even if the bills are viewed as "regulatory," they would put the states into an area exclusively regulated by the federal government (and in which the states have no expertise). At best they would be redundant, at worst they would be in conflict with federal programs. But whether redundant or conflicting, they are preempted by the Atomic Energy Act.

Id. at 455.

135. *See, e.g.*, Pacific Legal Fd'n v. State Energy Conservation & Development Comm'n, 472 F. Supp. 191 (S.D. Cal. 1979). Recently the Attorney General of California viewed the preemption doctrine, as interpreted in *Northern States*, as a bar to local regulation of transport of nuclear waste.

136. *Id.*

become another means of frustrating state and local government attempts to participate actively in the nuclear area.

V. SOLUTIONS AND ALTERNATIVES: CARTER'S PROGRAM AND OTHER NUCLEAR FABLES

After examining the NRC, the courts, and the powers of state governments, one is ineluctably drawn to the conclusion reached by President Carter. "In the past, states [and interested parties] have not played an adequate part in the waste management planning process—for example, in the evaluation and location of potential waste disposal sites. The states need better access to information and expanded opportunity to guide waste management planning."[137] Whether the state planning council cures this defect depends upon its powers. In his order, President Carter outlined the Council's functions:

> (a) Recommend procedural mechanisms for reviewing nuclear waste management plans and programs in such a way to ensure timely and effective state and local involvement. Such mechanisms should include a consultation and concurrence process designed to achieve federal, state, and local agreement which accommodates the interests of all the parties.
>
> (b) Review the development of comprehensive nuclear waste management plans including planning activities for transportation, storage, and disposal of all categories of nuclear waste. Provide recommendations to ensure that these plans adequately address the needs of the state and local areas affected.
>
> (c) Advise on all aspects of siting facilities for storage and disposal of nuclear wastes, including the review of recommended criteria for site selection and site suitability, guidelines for regional siting, and procedures for site characterization and selection.
>
> (d) Advise on an appropriate role for state and local governments in the licensing process for nuclear waste repositories.
>
> (e) Advise on proposed federal regulations, standards, and criteria related to nuclear waste management programs.
>
> (f) Identify and make recommendations on other matters related to the transportation, storage, and disposal of nu-

137. President's Message *supra* note 1, at 2.

clear waste that the Council believes are important.[138]

From these words, important verbs emerge: "recommend," "review," "advise," and "identify." Nowhere is the Council given real power. The President stated that the Council's operation would be based on the principle of consultation and concurrence, with the states in the matter of high level radioactive waste storage sites. Noticeably absent from this principle is any control for local government. The control remains in the Nuclear Regulatory Commission which must continue to license and regulate all nuclear facilities.

Public frustration and mistrust of the NRC remain. The situation calls for alternatives to the President's program. Sadly, reasonable alternatives were spelled out in the Rogovin Report[139] but were ignored by the President. The recommendations included:

(1) reorganization of the NRC to a single administrative agency;
(2) establishment of an independent Nuclear Safety Board;
(3) establishment of an Office of Public Counsel to aid intervenors and take appropriate legal action on its own initiative; and
(4) funding of intervenors who make substantial contributions in licensing and generic proceedings.[140]

Implementation of the Rogovin recommendations would invite public participation and open discussion of the issues. The use of such reforms would not resolve the on-going debate over the safety and desirability of nuclear energy. It would, however, at least bring into proper perspective the views of those who have opposed NRC policies.

Without further congressional action, the rights of the public in the nuclear area will remain severely limited. The NRC was created to license and regulate, not to ban nuclear energy. It is now time for Congress to consider whether the country will be safest in the hands of the NRC doing business as usual, or whether the time has come to devise a more effective and publicly sensitive mechanism to control nuclear power in the United States.

138. Exec. Order No. 12,192, *supra* note 4.
139. *Supra* note 21 *passim*.
140. *Id.*